

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MAXIMILLIAN SALAZAR III,

Plaintiff,

vs.

MONACO ENTERPRISES, INC;
GENE MONACO; and ROGER
BARNO,

Defendants.

No. 2:12-CV-00186-LRS

ORDER DENYING MOTION FOR
RECONSIDERATION

BEFORE THE COURT is Defendants' Motion for Reconsideration Re: ECF No. 468 (ECF No. 468), to which Plaintiff has filed a Response (ECF No. 494) and Defendants a Reply (ECF No. 496). Defendants seek reconsideration of this Court's Order Declaring Mistrial (ECF No. 468). Defendants object to the finding made by this Court that the Defendants were obligated to disclose the notarized, executed January 24, 2013 affidavit of Bill Franks ("Franks Affidavit") pretrial. Defendants argue two grounds justifying their intentional failure to disclose the affidavit: (1) the affidavit was obtained, intended, and used for impeachment purposes and therefore exempt from pretrial disclosure and discovery; and (2) it

1 was attorney work product.

2 **I. Legal Standard**

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4 Defendants' claim in their Reply that reconsideration is appropriate to correct
5 "manifest injustice." District courts have the inherent authority to entertain motions
6 for reconsideration of interlocutory orders. *Amarel v. Connell*, 102 F.3d 1494, 1515
7 (9th Cir. 1996) ("[I]nterlocutory orders ... are subject to modification by the district
8 judge at any time prior to final judgment."); *see also Fed.R.Civ.P. 54(b); Balla v.*
9 *Idaho State Bd. of Corr.*, 869 F.2d 461, 465 (9th Cir. 1989). Although seven (7)
10 such motions have been filed in this case, motions for reconsideration are generally
11 disfavored and are considered "an extraordinary remedy, to be used sparingly in the
12 interests of finality and conservation of judicial resources." *Kona Enters., Inc. v.*
13 *Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (internal quotation marks
14 omitted). As neither Rule 54(b) or this Court's Local Rules provide a standard,
15 typically, district courts will apply standards substantially similar to those used under
16 Rule 59(e) and 60(b). Reconsideration is proper if the Court "is presented with
17 newly discovered evidence, committed clear error, or if there is an intervening
18 change in the controlling law." *Id. (quoting 389 Orange St. Partners v. Arnold*, 179
19 F.3d 656, 665 (9th Cir.1999)) (internal quotation marks omitted). Motions for
20 reconsideration are not to re-hash arguments the court has already thought through,
21 or present arguments or evidence for the first time which could reasonably have been
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1 raised earlier in the litigation. It is not a vehicle for a “second bite at the apple,”
2 “after thoughts,” or “shifting of ground.” *Ausmus v. Lexington Ins. Co.*, 2009 WL
3 2058549, at *2 (S.D.Cal. July 15, 2009)(unpublished).
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5 **II. ANALYSIS**

6 Applying this legal standard, Defendants’ Motion fails. Defendants’ Motion
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8 (1) identifies no manifest error of law or fact, nor presents any newly discovered
9 evidence; (2) offers arguments that already have been raised and rejected by this
10 Court; and (3) offers an argument which, though not raised earlier by Defendants,
11 is without merit.
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13 **A. Discoverability of Impeachment Evidence: Rule 26(a) and Rule 26(b)**

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15 Defendants contend that because the Franks Affidavit was not admissible for
16 substantive purposes at trial, it therefore fit into the “solely for impeachment”
17 category of evidence under Fed.R.Civ.P. 26(a)(3) and was not required to be
18 disclosed-- ever. This argument was previously raised, argued, briefed, considered,
19 and rejected by this Court, and therefore is not a valid basis for reconsideration.
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21 Defendants admit their intent was to provide “further authorities concerning the
22 distinction between impeachment and substantive evidence and use of the same.”
23 (ECF No. 487 at 2). None of these additional cases indicate this Court has erred.
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26 The primary concern surrounding the Franks Affidavit is its discoverability
27 and Defendants’ discovery obligations, not the affidavits’ admissibility at trial.
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1 Defendants' lengthy discussion of admissibility of prior inconsistent statements are
2 largely misplaced.

3 Rule 26(a) concerns "Required Disclosures" --i.e. the automatic disclosure of
4 materials *without* request-- not the scope of discovery. Under Rule 26(a)(1)
5 governing "initial disclosure[s]" exempts documents the disclosing party may use
6 "solely for impeachment." Likewise Rule 26(a)(3) governing "pretrial disclosures,"
7 states that a party shall provide to other parties "information regarding the evidence
8 that it may present at trial *other than solely for impeachment purposes.*" Both
9 primary cases relied upon by Defendants in their Motion -- *Gribben v. UPS*, 528
10 F.3d 1166, 1172 (9th Cir.2008) and *In re Watkins*, 343 F.Appx. 245, 246 (9th Cir.
11 2009)(unpublished) --discuss this undisputed rule of law regarding pretrial disclosure
12 obligations required by Rule 26(a). Rule 26(a) is also discussed in the Bankruptcy
13 Appellate Panel's ruling in *In re Watkins*, 2008 WL 8462958 (9th Cir. BAP 2008).
14 Defendants misread *In re Watkins* in their Reply as it had nothing to do with
15 shielding discovery from "a discovery request...propounded." (ECF No. 496 at 4).
16 *Gribben* and *In re Watkins* are inapposite to the instant case concerning a specific
17 discovery request seeking discovery of written witness statements. Given the
18 discovery requests made by Plaintiff and the nature of the Franks Affidavit, the
19 Court's decision does not depend upon whether the Franks Affidavit constituted a
20 "document" or falls within the scope of Rule 26(a)'s "solely for impeachment
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1 purposes.”

2 Rule 26(b) defines the scope of discovery – the means by which information may
3 be obtained from others *upon* request: “Parties may obtain discovery regarding *any*
4 *matter*, not privileged which is *relevant* to the subject matter involved in the pending
5 action ...” (emphasis added). The plain language and broad scope contemplated by
6 Rule 26(b) has been explained by the United States Supreme Court. *Hickman v.*
7 *Taylor*, 329 U.S. 495 (1947)(“[C]ivil trials in the federal courts no longer need be
8 carried on in the dark. The way is now clear, consistent with recognized privileges,
9 for the parties to obtain *the fullest possible knowledge of the issues and facts before*
10 *trial*); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978)(“Nor is discovery
11 limited to the merits of a case, for a variety of fact-oriented issues may arise during
12 litigation that are not related to the merits.”); *United States v. Procter & Gamble*
13 *Co.*, 356 U.S. 677 (1958)(“modern instruments of discovery serve a useful
14 purposes...They together with pretrial procedures make a trial less a game of
15 blindman’s bluff and more a fair contest with the basic issues and facts disclosed to
16 the fullest practicable extent. Only strong public policies weigh against disclosure.”).

17 A party may not unilaterally narrow the scope of relevant discovery items
18 based upon its subjective intent to use the item for impeachment purposes. No
19 categorical “impeachment” limitation applies to materials sought through specific
20 interrogatories and requests for production of documents. *See Wright, Miller &*
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1 *Marcus*, 8 *Fed. Prac. & Proc. Civ.* § 2015 (citing authority and noting “[t]he fact
2 that the party responding to discovery intends to use the material only for
3 impeachment does not take it out of the realm of discoverable material if it is
4 otherwise relevant”; if discovery of evidence tending to impeach by contradiction is
5 not permitted, the discovery rules “might as well be repealed”). As set forth in the
6 Court’s Order Declaring Mistrial, Defendants were required by operation of the self-
7 executing Federal Rules of Civil Procedure to disclose the Franks Affidavit (or the
8 grounds for withholding it) in a supplemental response to Interrogatory No. 14:
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12 Interrogatory No. 14: Have any statements whether written, oral, or recorded
13 been taken of any of the persons listed in your answer to Interrogatory No.
14 12? If so, please state: (a) The date of each statement; (b) Whether it was
15 written, oral or recorded; (c) The name of the person taking the statement; and
16 (d) The substance of each statement.

17 (ECF No. 56, Ex. A at 13). Defendants’ objection to this interrogatory was overruled
18 by the Court when it granted Plaintiff “an additional 15 interrogatories, for a total of
19 45 interrogatories, including related subparts...” (ECF No. 209 at 6). *See also ECF*
20 *No. 172* (Discovery Master Order stating that Plaintiff is allowed 40 interrogatories
21 which “includes those already served...”). Defendants never supplemented their
22 response to Interrogatory No. 14.
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24 Defendants *did* supplement their responses to Interrogatory No. 19 and
25 Request for Production No. 134, but the disclosure, certified by defense counsel, was
26 not “complete and correct” as required by Rule 26(g):
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1 Request for Production No. 134: Provide any and all documents in native
 2 format, including written and electronic form with metadata intact, identified
 3 in the preceding Interrogatory¹.

4 **ANSWER: Defendant has already produced all responsive documents.**

5 (ECF No. 463, Ex. 1 at 6) (emphasis in original). The Franks Affidavit specifically
 6 regarded the October 2011 meeting referenced in Defendants' preceding response to
 7 Interrogatory 19, yet it was not disclosed. *See Pilling v. General Motors Corp.*, 45
 8 F.R.D. 366, 369 (D. Utah 1968)(addressing the subject of how to interpret
 9 interrogatories and stating "[n]either questions nor their answers should be
 10 interpreted with excessive rigidity or technicality, but a rule of reason should be
 11 applied as to both.").

12 The lack of authority cited by Defendants in their Motion on this point is
 13 telling. *Varga*, also cited in this Court's Order Declaring Mistrial, forcefully
 14 addressed this issue after defendant had withheld documentary evidence that was
 15 responsive to pretrial discovery requests and produced for the first time at trial:

16 We take this occasion to emphasize *what Rule 26(b) makes perfectly clear*: the

17 ¹ Interrogatory No. 19 and Defendants' Supplemental Response stated this:

18 Interrogatory No. 19: Identify with specificity the reason or reasons why MEI
 19 terminated Plaintiff's employment.

20 **ANSWER: Plaintiff was terminated for insubordination based on his**
 21 **conduct at a meeting involving the plaintiff, Mr. Franks, Mr. Gene**
 22 **Monaco, Mr. Roger Barno, and Mr. Steve Cesare in October 2011.**

23 (ECF No. 463, Ex. 1 at 6) (emphasis in original)

1 recipient of a properly propounded document request must produce all responsive
2 non-privileged documents without regard to the recipient's view of how that
3 information might be used at trial. A party may not, under any circumstances,
4 hold back materials responsive to a proper discovery request because it prefers to
use the evidence as surprise impeachment evidence at trial.

5 *Varga v. Rockwell International Corp.*, 242 F.3d 693, 697 (6th Cir. 2001)(emphasis
6 added). *See also*, *Klonoski v. Mahlab*, 156 F.3d 255, 270 (1st Cir.1998) (superseded
7 in unrelated part by rule amendment as stated in *In re Subpoena to Witzel*, 531 F.3d
8 113 (1st Cir.2008)); *Newsome v. Penske Truck Leasing Corp.*, 437 F.Supp.2d 431,
9 434 (D.Md. 2006); *McDaid v. Stanley Fastening Sys., LP*, 2008 WL 2928387 (July
10 28, 2008); *Karr v. Four Seasons Maritime, Ltd.*, 2004 WL 797728 (E.D.La., Apr.12,
11 2004).

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15 Defendants' unsupported position would seemingly have this Court adopt a
16 rule that "no opportunity may be afforded either party to impeach evidence which is
17 itself impeachment, but both must await the uncertain fate which befalls litigants
18 when confronted for the first time in the courtroom with surprise testimony for which
19 they are wholly unprepared." *Boldt v. Sanders*, 111 N.W.2d 225, 227–228 (1961)
20 (per Otis, J.). "For us to revert to this philosophy would be judicial retrogression
21 undermining the whole purpose of the rules of civil procedure. It would inevitably
22 lead us back to the 'poker hand' concept of litigation, rewarding artifice and
23 camouflage." *Id.*

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27 Not only could the Franks Affidavit possibly have been the subject of possible
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1 impeachment itself, but in this case, the purported factual information it contains
2 bears directly on central issues in this case. Evidence withheld as impeachment
3 evidence, but which is either usable for a substantive purpose (or could lead to the
4 discovery of evidence useable substantive purpose) or would be responsive to a
5 specific discovery request, must be produced. *See e.g., Newsome v. Penske Truck*
6 *Leasing Corp*, 437 F.Supp.2d 431 (D.Md. 2006). The attorney doubting that “little
7 voice” in his or her “conscience that murmurs turn over all material information,”
8 *Haeger v. Goodyear Tire and Rubber Co*, 906 F.Supp.2d 938 (D.Az. 2012), should
9 submit it to the Court to decide its value pretrial. Defendants and defense counsel
10 did neither.
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12 **B. Work Product**

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16 Second, Defendants inject a new theory that Mr. Franks’ prepared witness
17 statement was attorney work product and therefore shielded from disclosure for over
18 two years until Mr. King opted to utilize it: at trial. Defense counsel did not raise a
19 a “work product” defense at the hearing on the Motion for Mistrial. The Defendants’
20 first mentioned a work product privilege *after* the Court declared mistrial. (ECF No.
21 473). Defendants do not offer a valid reason this argument could not have been
22 previously advanced when the mistrial motion was originally argued. Nonetheless,
23 the argument is addressed here.
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27 Work product enjoys immunity from discovery and is defined under
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1 Fed.R.Civ.P. 26(b)(3). For now, looking past the less clear issue of whether this third
2 party witness affidavit qualified as attorney work product after it is signed, any
3 objection on grounds of attorney work protection was *waived* when Defendants
4 failed to timely assert the objection in specific response to the Plaintiff's discovery
5 requests. Defendants never produced a privilege log required by Fed.R.Civ.P.
6 26(b)(5). *See BNSF Ry. Co. v. U.S. Dist. Ct., Dist. of Mont.*, 408 F.3d 1142, 1149–
7 50 (9th Cir. 2005). Rule 26(b) contains no exemption for information that the
8 defense unilaterally characterizes as impeachment. Defendants instead rely entirely
9 on a preliminary section of their discovery Responses entitled “Defendant MEI’s
10 General Objections,” wherein a boilerplate work product objection was stated once.
11 (ECF No. 56, Ex. A). The prohibition against general or blanket objections to
12 discovery requests has long been established. *Id.* (“We hold that boilerplate
13 objections or blanket refusals inserted into a response to a Rule 34 request for
14 production of documents are insufficient to support a privilege.”). The “general
15 objection” section such as that used here is meaningless, ineffective and improper as
16 it is impossible to tell whether information has been withheld, and if so, why. *Id.*
17 The Federal Rules provide that objections to discovery must be made with
18 specificity. *See* Fed.R.Civ.P. 33.

19 Defendants rely heavily upon the rationale in a California district court case,
20 *Intel Corp v. VIA Technologies, Inc.*, 204 F.R.D. 450 (N.D.CA 2001), a case clearly
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1 distinguishable from the case at hand. In *Intel Corp*, the posture of the case was
2 *pretrial* and the Plaintiff moved to strike a defense witness (a former employee of
3 Plaintiff) declaration submitted in support of a defense summary judgment motion.
4 The court refused to strike the third-party witness statement because: 1) the defense
5 witness was “uncovered late in the process,” but timely disclosed; 2) the statement
6 was “obtained in anticipation of an imminent summary-judgment motion,” where
7 there is no “bar to previewing testimony in a written form...for the purpose of
8 isolating material fact issues”; and 3) the declaration drafted by an attorney was work
9 product until the moment it is was filed. The court reasoned that because it would
10 be “normal practice” for counsel to interview a witness and perhaps obtain a
11 statement, therefore “[d]isclosing that fact would only disclose what should be
12 presumed by prudent counsel.” *Id.* at 452.

13 Unlike the witness discovered in *Intel*, Mr. Franks was known by the parties
14 from day one as a percipient witness and friend of Plaintiff, who before this case was
15 ever filed had testified favorably for Plaintiff at his unemployment hearing. Unlike
16 in *Intel*, it is not clear when the statement may have been prepared, for what purpose,
17 or under what circumstances. Though drafted to appear as a pleading, the Franks
18 Affidavit was never submitted or referenced as any part of the pretrial motion
19 practice, nor for in camera review. While there may be exceptions, normally,
20 statements or affidavits from nonparty witnesses – even if drafted by an attorney—
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1 are not protected by the work product doctrine and the witness is entitled to a copy
2 of his own statement. *See discussion, Ford Motor Co. v. Edgwood Properties, Inc.*,
3 257 F.R.D. 418 (D.N.J. 2009). The Franks Affidavit purports to be a recitation of
4 facts within the personal knowledge of Mr. Franks—not an attorney’s theory,
5 thoughts, mental impressions, or trial strategy. As noted by one court:
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8 Granted, [Defendant] secured those statements in anticipation of litigation.
9 However, if it now suggests that it may interpose the work product doctrine
10 because it then put words in the mouths of those third-party affiants as part of
11 its litigation strategy, it misperceives the nature of the doctrine. [Plaintiff]
12 seeks no more than factual statements of these non-party witnesses. It should
13 not be frustrated in its ability to test the perception and credibility of these
14 persons.

15 *Milwaukee Concrete Studios, Ltd. v. Greeley Ornamental Concrete Products, Inc.*,
16 140 F.R.D. 373, 379 (E.D.Wis. 1991).

17 Defendants are correct that when a witness is disclosed all parties are on notice
18 that the other side may well have interviewed the witness and obtained a statement.
19 Apparently, Mr. Franks did not volunteer the existence of the affidavit on any
20 occasion he may have spoken to Plaintiff’s counsel – a fact which raises questions
21 in itself. Be that as it may, the Federal Rules of Civil Procedure ordinarily head off
22 the present problem as they require Defendants to fully respond to discovery requests
23 to produce third-party sworn statements in their possession or disclose the legal
24 reasons for withholding them. This gives the opposing party to the opportunity to
25 move for in camera review so the *court* can decide. This did not occur in this case.
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1 **III. CONCLUSION**

2 The Defendants failed to abide by the Federal Rules of Civil Procedure.
3 Neither did they disclose the existence of the Franks Affidavit in response to
4 Plaintiff's discovery requests. Where neither the Court nor Plaintiff had knowledge
5 of its existence, there was no opportunity to cure the problem.
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8 Defendants' Motion for Reconsideration (ECF No. 487) is **DENIED**.

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10 **DATED** THIS 14th day of December, 2015.

11 *s/Lonny R. Suko*

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13 LONNY R. SUKO
14 SENIOR U.S. DISTRICT COURT JUDGE
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